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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVIN JEREMY RODRIGUEZ, Defendant and Appellant.	F075117 (Super. Ct. No. F14910863) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Paul E. O'Connor, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

The crime in this case occurred after a chance encounter one night on the street between defendant Davin Jeremy Rodriguez and the victim, who did not know one another. An altercation ensued during which defendant stabbed the unarmed victim nine times with a knife, resulting in the victim's death. Defendant was arrested approximately seven weeks later and charged with second degree murder. Following a trial by jury, defendant was acquitted of murder and convicted of the lesser included offense of voluntary manslaughter. (Pen. Code, § 192, subd. (a).)[1] The jury also found true that defendant personally used a deadly or dangerous weapon during the commission of the crime. (§ 12022, subd. (b)(1).) The trial court sentenced defendant to the upper term of 11 years plus one additional year for the weapon enhancement, for a total determinate term of 12 years in prison.

On appeal, defendant claims that his statement to police, which was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) given his repeated invocation of his right to counsel, was involuntary and, therefore, the trial court erred in admitting the statement as impeachment evidence. (*People v. Neal* (2003) 31 Cal.4th 63, 78 (*Neal*); *People v. Peevy* (1998) 17 Cal.4th 1184, 1205 (*Peevy*).) Defendant also claims that the trial court erred in failing to instruct the jury sua sponte on involuntary manslaughter, and that trial counsel rendered ineffective assistance of counsel in failing to object to the introduction of evidence of the knife found in his backpack when he was arrested, soliciting improper opinion evidence from Detective Ledbetter that undermined the defense theory, calling a witness who opened the door to prejudicial evidence, and failing to request a jury instruction on the theory of accident. Finally, defendant claims cumulative error occurred.

The People dispute defendant's entitlement to any relief on his claims.

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1 All further statutory references are to the Penal Code.

We find no error and we affirm the judgment.

FACTUAL SUMMARY

I. Prosecution Case

The victim in this case, Jerald R., went to the Tower District in Fresno with a friend, Kimberly C., on the night of October 5, 2014, at approximately 9:45 p.m. They had been using Jerald's girlfriend's car that day and were supposed to pick her up from work at 11:00 p.m. The car was almost out of gasoline, however, and they did not have any money with them so they planned to panhandle for some. Kimberly went to one of the restaurants on Olive Avenue to see if her brother, a security guard there, was on duty so she could ask him for money. The two parted company at the restaurant and planned to meet back there a short while later. Kimberly last saw Jerald walking westbound on Olive.

Around 10:00 p.m., Reginald C. left one of the restaurants in the Tower District and was driving westbound on Olive when he saw two men he described as a slender Black man, identified as Jerald, and a shorter Hispanic man of average build, identified as defendant, facing each other on the north side of Olive.[2] Reginald initially thought the men were playfighting but realized they were really fighting and, after he passed them, he made a U-turn in his car. He then made a second U-turn and pulled his car over to the curb on the north side of Olive to watch the men. He testified that both men were swinging and kicking at each other. By then he had rolled down his car window and he heard someone loudly say, "[O]h, you're pulling a knife out on me."

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[2] Defendant was eventually identified as a potential suspect following a tip to Crime Stoppers and he was arrested approximately seven weeks after the crime. Although neither Reginald nor the witness who saw a chubby Hispanic man without a shirt running south from the crime scene described the individual other than in very general terms, there was evidence linking defendant to the crime, including surveillance video and a trail of his blood leading south along his flight route. Because identity was not an issue at trial and defendant pursued a self-defense theory, we summarize only those facts relevant to the issues raised in this appeal or necessary for clarity.

Reginald testified that defendant took off and crossed Olive with Jerald right behind him. They then continued fighting on the south side of Olive and both men ended up "tussling" on the ground. Reginald saw Jerald on his back and defendant on top of him. Reginald did not see any weapons but he heard the same voice as before say, "Oh, now you're stabbing me." Defendant then got up, took off his shirt and stood over Jerald for several seconds before running south down a cross street. Jerald stood up and took several steps west before collapsing on the sidewalk. Reginald exited his car and crossed the street to check on Jerald. After seeing a pool of blood, he called 911.

Dr. Chambliss, the forensic pathologist who conducted Jerald's autopsy, testified that Jerald's "upper teeth were disrupted, essentially knocked out" and he sustained nine stab wounds consistent with a single-edge blade; a cut to the side of his upper lip; multiple abrasions on his face, shoulders, elbow and thigh; and a fractured pinkie finger, although Chambliss could not determine if the fracture was fresh. Jerald had no abrasions or bruising on his hands, and he had been stabbed in the heart through his chest, in his lung through his back and three times in one arm pit in an area where there was a collection of blood vessels. In addition, he had a stab wound to his left shoulder that went approximately two inches into the muscle, a superficial stab wound to his right shoulder, a small stab wound to his jaw area, and a deep stab wound around his right knee. Chambliss testified that Jerald died from the injuries to his heart, lung and arm pit, and that the wound to the heart was almost immediately fatal, although it was possible for Jerald to have been stabbed on the north side of the street, continue the altercation and, without leaving a blood trail, cross the street before dying.[3] Chambliss could not offer an opinion on which order the wounds were inflicted or how they were inflicted in terms of the men's positions.

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3 In addition to the large pool of Jerald's blood on the south side of the street where he died, Jerald's blood was found on the north side of the street where the altercation began but there was no trail of blood crossing Olive.

II. Defense Case

A. Defendant's Testimony

Defendant testified that he was going for a run that night wearing black Dickies pants and a tan shirt, and that he always carried a knife in his pocket for protection, although he had never needed to use it before. He described the knife as a folding knife that flipped open and had a two- or three-inch blade and a handle similar in size.

After crossing to the north side of Olive, defendant stopped at a doughnut shop along Olive to look at some tagging on a window and then continued westbound on Olive. As he was crossing Echo Avenue, he noticed someone following him. He turned around, asked why the man was following him and told the man—Jerald—to go away. Defendant testified that Jerald began walking quickly and then running toward him like he was going to attack. Jerald said something, but defendant did not hear what it was. Fearing an attack, defendant pulled the knife out of his pocket and flicked the blade open. As Jerald swung at him, defendant pushed Jerald with both hands: the palm of his left hand and his right hand, in which he held the knife. Defendant testified that although he was not sure, he thought the knife connected with Jerald and Jerald said something about defendant stabbing him. Defendant was not sure if any of Jerald's punches ever landed, but he testified that Jerald kept attacking him. He also testified that several times, Jerald said, "[Y]ou're just going to stab me."

Defendant described trying to run backward and trying to turn around, without success. He said he got low to the ground and then fell in the middle of Olive close to the south side, where Jerald kicked him and stomped him. Defendant testified that Jerald did not sound like he was afraid and kept making comments about stabbing while defendant was yelling for him to go away.

Defendant got up from the ground and pushed Jerald, inadvertently stabbing himself in the hand. The two men fell to the ground with Jerald on the bottom and defendant on top. Defendant testified that Jerald was grabbing onto him and his shirt

ended up pulled over his head. Defendant kept swinging at Jerald until Jerald finally let go of him. Defendant got up and ran, and Jerald said, "Keep running, you little bitch." As defendant ran home, he removed his shirt, wrapped his bleeding hand in it, and threw the knife in an alleyway. He later threw his clothing away as well.

B. Forensic Pathologist's Testimony

Dr. Chambliss testified for the defense that Jerald had 666 nanograms per milliliter of cocaine in his blood at the time of his death, as well as cocaine and marijuana metabolites. Chambliss explained that a metabolite is a nonactive component and would not affect an individual, but the level of cocaine in Jerald's system was "a relatively higher amount" with under 100 considered low. Although Chambliss did not know Jerald's history of drug use and could not offer an opinion regarding a specific individual's behavior at that level, he testified that cocaine is a stimulant and aggression can occur with cocaine use.

III. Rebuttal

After defendant testified, the prosecutor played his recorded police interrogation, and the trial court instructed the jury that it could consider the evidence only to assess the credibility of defendant's trial testimony. During his interrogation, defendant repeatedly denied any involvement in the crime and denied he was on Olive on October 5, 2014, at approximately 10:00 p.m.

Detective Ledbetter testified regarding video surveillance footage police obtained from several businesses along Olive. Although the altercation between defendant and Jerald was not captured on camera, Ledbetter was able to track defendant's movements along Olive that night walking eastbound on the south side of Olive and then crossing to the north side of Olive. Ledbetter also tracked Jerald walking westbound on Olive and passing the doughnut shop without anyone walking in front of or behind him. Ledbetter testified that defendant was looking at or into the window of the doughnut shop at

10:06:11, the victim was walking past the doughnut shop between 10:06:12 and 10:06:28, and defendant was leaning against the wall at 10:06:33.[4]

DISCUSSION

I. Admission of Statement to Police for Impeachment Purposes

A. Background

There is no dispute that defendant requested an attorney multiple times during his police interrogation and, therefore, his statement was obtained in violation of his *Miranda* rights. After defendant took the stand during trial and testified that he acted in self-defense, however, the prosecutor sought to use his statement, during which he denied being involved in the crime or being present in the area, for impeachment. Relying on *Neal* and *Peevy*, discussed *post*, the trial court found that defendant's statement was voluntary and, therefore, admissible for impeachment. On appeal, defendant claims that his statement to police was involuntary and the trial court erred in concluding otherwise.

The People maintain that the trial court did not err. We agree.

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[4] The doughnut shop had four surveillance cameras, and footage from three of the cameras and several still images from the videos were introduced into evidence. The video showing the victim walking by the shop and the video showing defendant in the shop window were taken by separate cameras with different angles. The latter video showing defendant in the window is inferior in quality to the video showing the victim walking by the shop. It appears that in testifying defendant was leaning against a wall at 10:06:33, which is *after* the victim passed by the doughnut shop, Ledbetter was referring to the point in the video where defendant moves out of view.

The prosecutor argued during closing that based on defendant's movements and the shadows seen in the video, defendant dipped behind a wall and it was the victim who entered the cross street of Echo first. Defense counsel argued that the video does not show anything beyond defendant looking at something and then walking away. We have viewed the video and while we observed the shadows the prosecutor referred to, we cannot determine with any certainty what defendant's movements were once he left the window.

B. Legal Standard

"As a prophylactic safeguard to protect a suspect's Fifth Amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial law enforcement questioning, that 'he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.' [Citations.] If the suspect knowingly and intelligently waives these rights, law enforcement may interrogate, but if at any point in the interview he invokes the right to remain silent or the right to counsel, 'the interrogation must cease.'" (*People v. Martinez* (2010) 47 Cal.4th 911, 947; accord, *People v. Case* (2018) 5 Cal.5th 1, 20; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1085–1086.)

However, notwithstanding longstanding disapproval of the tactic (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1077 (*Nguyen*), citing *Neal*, *supra*, 31 Cal.4th at p. 90 (conc. opn. of Baxter, J.) & *Peevy*, *supra*, 17 Cal.4th at p. 1205), a statement obtained in violation of *Miranda*, even deliberately, is admissible for impeachment purposes so long as the statement was voluntary (*Neal*, *supra*, at p. 78, citing *Peevy*, *supra*, at p. 1188; accord, *People v. Sanchez* (2019) 7 Cal.5th 14, 58; *People v. Case*, *supra*, 5 Cal.5th at pp. 24–25; *Nguyen*, *supra*, at pp. 1075–1078).[5] "A statement is involuntary [citation]

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[5] In this case, Detective Ledbetter, one of the two detectives who interrogated defendant, testified that he believes the law presently allows him to continue questioning a suspect despite the invocation of rights. The California Supreme Court has observed that the rule in question, set forth in *Harris v. New York* (1971) 401 U.S. 222, 225 and known as the *Harris* rule, strikes "'a balance between the need to deter police misconduct and the need to expose defendants who perjure themselves at trial,'" and it "'applies even if the individual police officer violates *Miranda* and *Edwards* [*v. Arizona* (1981) 451 U.S. 477] by purposefully failing to honor a suspect's invocation of his or her right to counsel ….'" (*Nguyen*, *supra*, 61 Cal.4th at p. 1076, quoting *Peevy*, *supra*, 17 Cal.4th at pp. 1194 & 1196.) The court noted "that 'the [high] court's concern [in *Harris v. New York*] that police misconduct not become a shield for perjury would seem to apply whether the misconduct is intentional or merely negligent.'" (*Nguyen*, *supra*, at p. 1076.) However, the court has left open the question "whether [it] could or should create an

when, among other circumstances, it 'was "'extracted by any sort of threats …, [or] obtained by any direct or implied promises, however slight ….'"' [Citations.] Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of [the] circumstances.'" (*Neal*, *supra*, at p. 79; accord, *Nguyen*, *supra*, at p. 1078.) However, "[p]olice coercion is … crucial. To be considered involuntary, a confession must result from coercive state activity." (*People v. Sanchez*, *supra*, at p. 50, citing *Colorado v. Connelly* (1986) 479 U.S. 157, 165 & *People v. Smith* (2007) 40 Cal.4th 483, 502.)

"'In reviewing *Miranda* issues on appeal, we accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained.'" (*People v. Martinez*, *supra*, 47 Cal.4th at p. 949; accord, *People v. Case*, *supra*, 5 Cal.5th at p. 20.) Where, as here, "an interview is recorded, the facts surrounding the admission or confession are undisputed and we may apply independent review." (*People v. Duff* (2014) 58 Cal.4th 527, 551.)

C. Analysis

Defendant, quoting *People v. DePriest* (2007) 42 Cal.4th 1, concedes the interrogation was not lengthy, he was not threatened or promised anything, and he was not denied "human comforts or necessities." (*Id.* at p. 35.) He nevertheless contends that the trial court "ignore[d] … the psychological coercion inherent in the interrogation" and he relies on his repeated requests for counsel to demonstrate coercion. Continuing an

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exception to the rule permitting use of statements obtained in violation of *Miranda* and *Edwards* [*v. Arizona*] for impeachment if there was 'widespread, systematic police misconduct ….'" (*Ibid.*) It has also cautioned that "'[n]othing in *Peevy* was meant to condone deliberately improper interrogation tactics, whether individual or systematic.' [Citation.] 'Such practices tarnish the badge most officers respect and honor.' [Citation.] Police officers should not misread *Peevy* as an invitation to ignore their obligations under *Miranda* and *Edwards* [*v. Arizona*].'" (*Id.* at p. 1077.)

interrogation in the face of the invocation of the right to counsel does not, itself, compel a finding of official coercion, however, a point defendant acknowledges. (*People v. Case*, *supra*, 5 Cal.5th at pp. 24–25; *People v. DePriest*, *supra*, at p. 35; *People v. Bradford* (1997) 14 Cal.4th 1005, 1039.)

As previously stated, there is no dispute that detectives ignored defendant's requests for counsel, rendering his statement inadmissible other than for impeachment, but we have reviewed the audio of defendant's interrogation in full and conclude that defendant's claim of coercion is not supported by the record. Continuing an interrogation in the face of repeated requests for counsel is a factor for consideration in determining whether a statement is involuntary, but defendant cites no authority holding that requesting counsel, even repeatedly, renders an interrogation coercive without more.

In *Neal*, the California Supreme Court was most concerned with the continued interrogation of the defendant despite his repeated invocation of his right to remain silent and his right to counsel, but other factors also informed its determination that the defendant's confession was involuntary, including "the circumstance that [the] defendant remained in custody without being provided access to counsel before requesting to speak to [the detective]; [the] defendant's youth, inexperience, minimal education, and low intelligence; the deprivation and isolation imposed on [the] defendant during his confinement; and the promise and the threat [the detective] made to defendant during the initial interrogation after questioning should have ceased …." (*Neal*, *supra*, 31 Cal.4th at p. 78.) The defendant in *Neal* was only 18 years old at the time of his interrogations, he had failed to graduate from high school and his intelligence "was quite low." (*Id.* at p. 84.) He was questioned on three separate occasions and, between the first and second interrogations, he was detained overnight in a cell without access to a toilet or water. In addition, he was not provided with any food until after the third interrogation, which was more than 24 hours later. (*Id.* at pp. 74, 76.)

In this case, defendant was 23 years old at the time of the crime and subsequent interrogation, he was a high school graduate, and there is no indication in the record that his intelligence is low. Moreover, the interrogation was brief at only 25 minutes, approximately; it was uninterrupted; and it commenced at the reasonable hour of 5:29 p.m. In response to questions, defendant stated that he had not been drinking that day and did not use illegal narcotics, and when asked if he was mentally capable of speaking with them, he responded, "I am talking to you." Although the detectives ignored defendant's requests for counsel until the very end of the interrogation, their voices remained calm and conversational throughout the interrogation, and the audio recording evidences no aggression or other tactics designed to break defendant's free will.

Defendant's responses to detectives' questions do evidence frustration over being questioned about a crime he denied committing, but they do not suggest he was frightened, "decompensat[ing]," or "vulnerable and helpless," as defendant suggests. To the contrary, defendant was coherent and responsive during the interrogation and nothing in the record indicates he was mentally or physically impaired.

The California Supreme Court has made clear that continuing with an interrogation despite a defendant's invocation of rights constitutes police misconduct and any statement so obtained is "'obtained *illegally*.'" (*Nguyen, supra,* 61 Cal.4th at p. 1077, quoting *Peevy, supra,* 17 Cal.4th at p. 1204.) Nevertheless, having evaluated the totality of the circumstances in this case, we find no error in the trial court's determination that defendant's statement was voluntary and therefore admissible for impeachment purposes. In light of this conclusion, we need not address whether the admission of defendant's statement was prejudicial.

II. Failure to Instruct Sua Sponte on Involuntary Manslaughter

A. Background

Defendant claimed he stabbed Jerald in self-defense at trial. The court instructed the jury, in relevant part, on self-defense, second degree murder and voluntary manslaughter on heat of passion and imperfect self-defense theories. The court did not instruct the jury on involuntary manslaughter nor did defendant request the instruction. On appeal, defendant claims that the trial court erred in failing to instruct sua sponte on involuntary manslaughter and that the error was prejudicial.

We agree with the People that there was not substantial evidence of the absence of malice and, therefore, the trial court did not have a sua sponte duty to instruct on involuntary manslaughter. Having found no error, we do not reach the issue of prejudice.

B. Standard of Review

"As a general rule, 'a trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence.' (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) But a court must instruct on such theories only when the record contains '"'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense."'" (*People v. Smith* (2018) 4 Cal.5th 1134, 1163, quoting *People v. Whalen* (2013) 56 Cal.4th 1, 68, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 44, fn. 17; accord, *People v. Westerfield* (2019) 6 Cal.5th 632, 718.) A trial court's failure to instruct sua sponte on a lesser included offense is reviewed de novo. (*People v. Trujeque* (2015) 61 Cal.4th 227, 271; *People v. Brothers* (2015) 236 Cal.App.4th 24, 30 (*Brothers*).)

C. Analysis

1. Murder and Manslaughter

Murder is an unlawful killing with express or implied malice aforethought. (§§ 187, subd. (a), 188; accord, *People v. Rangel* (2016) 62 Cal.4th 1192, 1220.)[6] Express malice is shown when the defendant "'either desires the victim's death, or knows to a substantial certainty that the victim's death will occur.'" (*People v. Houston* (2012) 54 Cal.4th 1186, 1217; accord, *People v. Covarrubias* (2016) 1 Cal.5th 838, 890.) Implied malice has "'"both a physical and a mental component. The physical component is satisfied by the performance of 'an act, the natural consequences of which are dangerous to life.' [Citation.] The mental component is the requirement that the defendant 'knows that his conduct endangers the life of another and … acts with conscious disregard for life.'"'" (*People v. Soto* (2018) 4 Cal.5th 968, 974; accord, *People v. Rangel*, *supra,* at p. 1220.)

"Manslaughter, a lesser included offense of murder, is an unlawful killing without malice." (*People v. Elmore* (2014) 59 Cal.4th 121, 133; accord, *People v. Thomas* (2012) 53 Cal.4th 771, 813.) "A defendant commits voluntary manslaughter when a homicide that is committed either with intent to kill or with conscious disregard for life—and therefore would normally constitute murder—is nevertheless reduced or mitigated to manslaughter" (*People v. Bryant* (2013) 56 Cal.4th 959, 968 (*Bryant*)) by heat of passion or unreasonable self-defense (*People v. Elmore*, *supra,* at p. 133). "But in [either] circumstance[], a defendant convicted of voluntary manslaughter has acted either with an intent to kill or with conscious disregard for life." (*Bryant*, *supra,* at p. 970.)

"Involuntary manslaughter, in contrast, [is the] unlawful killing of a human being without malice. (§ 192.) It is statutorily defined as a killing occurring during the

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6 Section 188, which defines malice, and section 189, which defines degrees of murder, were amended, effective January 1, 2019, with respect to accomplice liability and the felony-murder rule. (Stats. 2018, ch. 1015, §§ 2, 3.) Those amendments are not relevant to this case.

commission of 'an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, [accomplished] in an unlawful manner, or without due caution and circumspection.' (§ 192, subd. (b).) Although the statutory language appears to exclude killings committed in the course of a felony, the Supreme Court has interpreted section 192 broadly to encompass an unintentional killing in the course of a *noninherently* dangerous felony committed without due caution or circumspection." (*Brothers, supra*, 236 Cal.App.4th at p. 31, citing *People v. Burroughs* (1984) 35 Cal.3d 824, 835, overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 88–91, italics added; see *Bryant, supra*, 56 Cal.4th at p. 966; *People v. Butler* (2010) 187 Cal.App.4th 998, 1006–1007.) More recently, the Court of Appeal in *Brothers* addressed the question left unanswered by the California Supreme Court in *Bryant* and held that "if an unlawful killing in the course of an *inherently* dangerous assaultive felony without malice must be manslaughter (*People v. Hansen* [(1994)] 9 Cal.4th [300,] 312) and the offense is not voluntary manslaughter (*Bryant, supra*, 56 Cal.4th at p. 970), the necessary implication of the majority's decision in *Bryant* is that the offense is involuntary manslaughter." (*Brothers, supra,* at pp. 33–34, italics added.)

2. No Error

Jerald was just over six feet tall and weighed 160 pounds, and Dr. Chambliss described him as slim but muscular. Defendant was 5 feet 6 inches tall and weighed approximately 220 to 230 pounds at the time of the crime, and he testified he was afraid of Jerald. He argues that he did not intend to kill Jerald but instead wanted "to convince [Jerald], by the 'show of force' via the pocket knife, to leave [him] alone" and he maintains that the presence of multiple stab wounds does not alter this conclusion.[7] He

[7] Quoting *People v. Rogers* (2006) 39 Cal.4th 826, 884, defendant argues that "'[a]n instruction on involuntary manslaughter is required whenever there is substantial evidence indicating the defendant did not actually form the intent to kill.…'" However, this argument overlooks that malice may be either express (intent to kill) *or* implied (conscious disregard for

concedes that the first stab wound was likely the fatal wound to Jerald's chest, but contends that the wound did not immobilize Jerald, there is no evidence that he knew he had fatally stabbed Jerald and, to the contrary, the fight between the two continued as they crossed the street and fell to the ground with Jerald on top of defendant.[8] Defendant casts the multiple stab wounds he inflicted as "indicative of [his] frenzied attempt to extricate himself from the situation."

""[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense …." [Citation.] Such instructions are required only where there is "substantial evidence" from which a rational jury could conclude' the defendant committed the lesser, but not the greater, offense." (*Brothers*, *supra*, 236 Cal.App.4th at p. 34; accord, *People v. Evers* (1992) 10 Cal.App.4th 588, 596 ["If a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence. By contrast where the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice."].) "[W]hen the evidence presents a material issue as to whether a killing was committed with malice, the court has a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense, even when the killing occurs during the commission of an aggravated assault. [Citations.] However, when … the defendant indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed, there is no sua sponte duty to instruct on involuntary manslaughter." (*Brothers*, *supra*, at p. 35.)

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life). (*Bryant*, *supra*, 56 Cal.4th at p. 970; *People v. Cook* (2006) 39 Cal.4th 566, 596; *Brothers*, *supra*, 236 Cal.App.4th at pp. 34–35.)

8 The evidence shows that defendant was on top of Jerald.

We agree with defendant that in determining whether there is substantial evidence requiring an instruction, his version of events may not disregarded; it is for the trier of fact to evaluate witness credibility and determine the facts. Even so, we are not persuaded by defendant's characterization of his testimony as constituting substantial evidence that he acted without malice when he stabbed Jerald.

Under defendant's version of events, he pulled the knife from his pocket and flicked it open as Jerald ran toward him and before Jerald made any contact with him, he pushed Jerald with both hands, one of which held the knife and likely inflicted the fatal wound to Jerald's heart. The two then swung at each other, at some point defendant fell to the ground and swung at Jerald with the knife while Jerald kicked at him, and then the two ended up crossing Olive with Jerald behind defendant. Based on the blood evidence on the north side of Olive, Jerald was stabbed at least once before the altercation moved across the street. On the south side of Olive, the two men ended up on the ground with defendant on top of Jerald. Defendant described Jerald grabbing him while he kept swinging with the knife. Despite this account of the altercation, Jerald did not have any abrasions or bruises on his hands, his teeth were knocked loose or out, he had multiple abrasions on his body, and he had nine stab wounds and a cut near his mouth. Defendant, in contrast, sustained a self-inflicted stab wound to his hand but did not testify to any other injuries and said he was not sure if Jerald landed any blows.

The Court of Appeal's decision in *Brothers*, addressed by both parties, is instructive. In that case, the defendant, with assistance from others, attacked and brutally beat a longtime friend of hers after allegations were made that he molested her grandchildren. (*Brothers*, *supr*a, 236 Cal.App.4th at pp. 27–28.) One of men who participated in the attack on the victim shoved a rag down the victim's throat. (*Id.* at p. 28.) The Court of Appeal for the Second District rejected the defendant's claim that the trial court should have instructed sua sponte on involuntary manslaughter, commenting, "Even crediting Brothers's testimony in its entirety, there was simply no

evidence from which a reasonable juror could entertain a reasonable doubt that Brothers had acted in conscious disregard of the risk her conduct posed to [the victim's] life. Brothers's own account unequivocally established she engaged in a deliberate and deadly assault because she had been enraged, 'out of control,' and unable to calm herself." (*Id.* at p. 34.) "There was no evidence of an accidental killing, gross negligence or Brothers's own lack of subjective understanding of the risk to [the victim's] life that her and her confederates' conduct posed." (*Ibid.*)

While we agree with defendant that some distinctions may be made between the facts in *Brothers* and the facts here, those distinctions do not compel the conclusion, urged by defendant, that here, there was substantial evidence from which a reasonable trier of fact could have concluded that he acted without malice.[9] To the contrary, stabbing someone repeatedly with a knife is without question "a type of aggravated assault the natural consequences of which are dangerous to human life" and there is no evidence that defendant failed to "subjectively appreciate[] the danger to human life his … conduct posed …." (*Brothers*, *supra*, 236 Cal.App.4th at p. 35.)

We note that after briefing was complete in this case, a different division of the Second District Court of Appeal found the refusal to instruct on involuntary manslaughter in a beating case prejudicial error and it reversed the defendant's conviction. (*People v. Vasquez* (2018) 30 Cal.App.5th 786, 790 (*Vasquez*).) The victim in that case had metal rods in his neck from a prior spinal surgery. (*Id.* at p. 791.) Although the defendant and another man punched the victim approximately 15 times, the defendant stomped the

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9 Defendant also argues that *People v. Cook*, *supra*, 39 Cal.4th 566 and *People v. Guillen* (2014) 227 Cal.App.4th 934 are distinguishable. In *People v. Cook*, the California Supreme Court rejected the defendant's claim that the trial court had a sua sponte duty to instruct on involuntary manslaughter, finding there was not substantial evidence supporting the instruction where the victim was savagely beaten to death with a board. (*People v. Cook*, *supra*, at pp. 596–597.) In *People v. Guillen*, the Court of Appeal rejected a challenge based on the trial court's failure to instruct sua sponte on involuntary manslaughter where the victim was hit, kicked and stomped over the course of 30 minutes. (*People v. Guillen*, *supra*, at pp. 1027–1028.)

victim's head and body approximately 20 times, and the other man threw a metal trash can at the victim, the fatal injury was a neck fracture that occurred just below the victim's jawline adjacent to the metal rods, which "could have acted as a fulcrum and contributed to the break." (*Ibid.*) None of the victim's other injuries were lethal (*ibid.*), and the defendant could not have known the victim's neck was more vulnerable due to the implanted rods (*id.* at p. 796). The Court of Appeal, observing that "California courts have long recognized that not all beatings are life-threatening" (*ibid.*), concluded that "[a] reasonable juror could have inferred from [the] evidence that the blows were not particularly severe and further inferred that [the] defendant believed beating up [the victim] would injure him but not kill him" (*ibid.*).

We need not decide whether we agree with this conclusion because *Vasquez* is readily distinguishable from the facts in *Brothers* and those here. In *Vasquez*, the victim had a hidden vulnerability and the defendant used his hands and feet to beat victim. (*Vasquez*, *supra*, 30 Cal.App.5th at p. 791.) In contrast, the victim in *Brothers* was beaten with a broom, burned with cigarettes and had a gag stuffed deeply down his throat (*Brothers*, *supra*, 236 Cal.App.4th at pp. 27–28), and here, the victim was stabbed repeatedly with a knife. Given the repeated use of a knife against Jerald, no reasonable juror could have concluded that defendant "lack[ed] a subjective awareness that his conduct carrie[d] '"a high degree of probability that it [would] result in death."'" (*Vasquez*, *supra*, at p. 795, quoting *People v. Knoller* (2007) 41 Cal.4th 139, 152.) We therefore conclude that, in this case, the trial court did not have a sua sponte to duty to instruct the jury on involuntary manslaughter and we reject defendant's claim to the contrary.

III. Ineffective Assistance of Counsel

Defendant identifies four grounds on which he allegedly received ineffective assistance of counsel. As we shall explain, we agree with the People that defendant has

not demonstrated deficient performance by trial counsel and given the absence of any error, we do not reach the issue of prejudice.

A. Standard of Review

"In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–692.) To demonstrate deficient performance, [the] defendant bears the burden of showing that counsel's performance '"'"fell below an objective standard of reasonableness … under prevailing professional norms."'"' (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) To demonstrate prejudice, [the] defendant bears the burden of showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. (*Ibid.*; *In re Harris* (1993) 5 Cal.4th 813, 833.)" (*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

"On appeal, we do not second-guess trial counsel's reasonable tactical decisions." (*People v. Lucas* (2014) 60 Cal.4th 153, 278, disapproved on another ground in *People v. Romero and Self, supra,* 62 Cal.4th at p. 53, fn. 19.) "[A] defendant's burden [is] 'difficult to carry on direct appeal,' as a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had '"'"no rational tactical purpose"'" for an action or omission." (*People v. Mickel, supra,* 2 Cal.5th at p. 198, quoting *People v. Lucas* (1995) 12 Cal.4th 415, 437.)

B. No Errors

1. Failure to Object to Evidence of Knife in Backpack

When defendant was arrested approximately seven weeks after the crime, he was carrying a backpack that contained, among other items, a sheathed knife with an eight inch blade. The knife and sheath were tested for the presence of blood, but none was detected. Defendant claims trial counsel erred in failing to object to the admission of the knife evidence.

Defendant premises his claim of error on the principle that "[w]hen the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant's possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056, citing *People v. Cox* (2003) 30 Cal.4th 916, 956, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 & *People v. Riser* (1956) 47 Cal.2d 566, 577, disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637 & fn. 2, 648–649; accord, *People v. Sanchez*, *supra*, 7 Cal.5th at pp. 55–56.) However, the rule more fully provides that "'[w]hen the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in [the] defendant's possession was the murder weapon. [Citations.] When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons.'" (*People v. Cox*, *supra*, at p. 956, quoting *People v. Riser*, *supra*, at p. 577; accord, *People v. Sanchez*, *supra*, at pp. 55–56.)

In this case, Jerald was stabbed to death with a knife, the murder weapon was not recovered at the crime scene and when defendant was subsequently arrested, he had a knife in his backpack. Although defendant testified that the knife found in his backpack was not the one he used that night and that he discarded the knife he stabbed Jerald with in an alleyway as he ran home, at the time of the prosecution's case-in-chief, there was no evidence arguably excluding the knife as the murder weapon, based either on an admission that another weapon was used or on physical evidence ruling out the knife found in defendant's backpack. As such, this is not a case where the weapon in question

was excluded as the murder weapon and the prosecutor introduced evidence of the weapon merely as character evidence. (*People v. Sanchez, supra,* 7 Cal.5th at p. 56 [evidence that prior to the crime, the defendant owned a gun that could have been the murder weapon was relevant and admissible]; *People v. Barnwell, supra,* 41 Cal.4th at p. 1056 [error to admit evidence of gun where prosecutor did not claim it was the murder weapon]; *People v. Cox, supra,* 30 Cal.4th at p. 957 [not error to admit evidence of guns in the defendant's possession where guns relevant either as possible murder weapons or as weapons used to coerce or subdue victims]; *People v. Riser, supra,* 47 Cal.2d at p. 577 [error to admit evidence of guns that could not have been the murder weapon].) Therefore, trial counsel did not commit error in failing to object.

2. Detective Ledbetter's Opinion on Initial Aggressor

Next, defendant faults trial counsel for asking Detective Ledbetter his opinion on the identity of the initial aggressor, thereby "adducing improper opinion evidence undermining the defense and going to his guilt." Again, no error occurred.

Defendant relies on cases standing for the proposition that a witness cannot "express an opinion on a defendant's guilt" because such opinions "are of no assistance to the trier of fact." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77, citing *People v. Torres* (1995) 33 Cal.App.4th 37, 47; accord, *People v. Vang* (2011) 52 Cal.4th 1038, 1048.) Trial counsel did not ask Ledbetter for his opinion on whether defendant was guilty or innocent of committing the crime with which he was charged, however. Instead, counsel inquired, "You did the investigation in this case. You talked to all of the witnesses. You looked at all the reports. What facts in this case indicate to you who the initial aggressor was in this case?"

Defendant asserts counsel's question elicited evidence that destroyed his self-defense theory, but we disagree. There was no dispute that defendant stabbed Jerald and, therefore, Ledbetter's reliance on evidence that the victim was stabbed nine times and had no injuries on his hands caused no damage to the defense that did not already exist.

As well, although Ledbetter cited the camera footage, the footage did not actually capture any of the fight. Finally, the trail of defendant's blood leaving the scene, also cited by Ledbetter, placed defendant at the scene, but did not undercut the defense theory. To the contrary, the evidence of the blood trail leading away from the scene was consistent with defendant's testimony that he stabbed himself in the hand and the blood trail ended at the point he wrapped his hand in his shirt.

The trial evidence did not include any independent eyewitness testimony as to how the fight began or any video camera surveillance footage of the fight. The defense proceeded on the theory that Jerald was the initial aggressor and defendant repeatedly stabbed him in self-defense during an ongoing altercation. Counsel's inquiry to Ledbetter was a reasonable tactical decision given that it bolstered the defense theory by underscoring the absence any direct evidence by the prosecution as to how the fight began. As well, as the People argue, this line of inquiry supported the counsel's argument that Ledbetter was a biased, and overzealous, investigator who "crossed the line from investigator to prosecutor." We find no merit to defendant's characterization of the question as inviting an opinion on his guilt or innocence and we reject his contention that the question harmed his defense.

3. Calling Veronica M. as Defense Witness

Defendant also claims counsel erred in calling Veronica M. to testify because she provided no relevant or helpful information and, instead, her testimony opened the door to prejudicial information. Defendant acknowledges that "[w]hether to call certain witnesses is … a matter of trial tactics, unless the decision results from unreasonable failure to investigate." (*People v. Bolin* (1998) 18 Cal.4th 297, 334, citing *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.) He contends, however, that trial counsel committed a tactical error that reflected either a failure to conduct an adequate investigation or inadequate preparation.

At the time of the crime, Vernonia and her husband, Christopher G., lived next door to defendant and his family in the same duplex. Christopher testified, with great reluctance, for the prosecution. He said he became aware of the murder on the day it happened because a family member he planned to visit warned him to be careful. He stated that after he became aware of the crime, he saw defendant returning home on foot, walking quickly and slightly red-faced. The prosecutor theorized that the motive underlying the stabbing was racial; specifically, that defendant stabbed Jerald because he was Black. After detectives knocked on his door, Christopher told them that prior to the crime, defendant expressed dislike for Black people and did not like them moving into his neighborhood, and after defendant came home the day of the crime, he stated he had been in a fight and said, "'I stabbed that n____.'" However, inconsistent with other evidence, Christopher also testified with certainty that he saw defendant returning home *before* sunset, that defendant was wearing shorts and a shirt, and that he did not see any blood or injuries on defendant. On cross-examination, Christopher reiterated that he saw defendant on the day of the crime after it happened, but he conceded that some of the information he provided detectives came not from defendant but from defendant's brother-in-law. As well, Christopher testified he has trouble with his memory and has since birth. Christopher denied reporting any information to Crime Stoppers or trying to profit from the crime.

Veronica was at home the night of the crime and although she testified she saw her husband speaking with defendant, she did not hear what was said. She testified defendant was wearing a white T-shirt and gray sweats, and was "amped up." Veronica was also present when Christopher spoke with detectives. Veronica testified that Christopher spoke with defendant around 10:00 p.m. and he told her defendant stated, "'I stabbed that n____.'" She also testified that defendant did not like Black people and she denied that all of Christopher's knowledge regarding defendant's statements came from defendant's brother-in-law. Veronica denied that either she or Christopher called Crime Stoppers.

Christopher's testimony tied defendant to the crime circumstantially and supported the prosecutor's theory of a race-based motive. However, Christopher expressed certainty that he saw defendant returning home before the sun set on the day of the crime, in direct conflict with the undisputed evidence that the crime occurred after dark at approximately 10:00 p.m., and he also conceded toward the end of his testimony that at least some of the information he presented as firsthand knowledge came from defendant's brother-in-law. Trial counsel could have reasonably believed that Veronica's testimony would corroborate that given by her husband, further undermining the credibility of Christopher's testimony that he saw defendant after the commission of the crime but before sunset and, by extension, also undermining the credibility of Christopher's testimony that defendant did not like Black people. Indeed, in closing argument, trial counsel focused on Christopher's lack of credibility as a witness. Counsel argued that neither Christopher nor Veronica in fact saw defendant the night of the crime and, as the People point out, counsel postulated that Christopher, relying on information obtained from defendant's brother-in-law, had a financial motive to report the tip to Crime Stoppers.

Under these circumstances, defendant cannot show that there was no rational tactical purpose underlying counsel's decision to call Veronica as a witness. (*People v. Mickel, supra,* 2 Cal.5th at p. 198.) He also has not affirmatively shown that counsel failed to conduct an adequate investigation or failed to adequately prepare. (*Ibid.*; *People v. Bolin, supra,* 18 Cal.4th at p. 334.) Christopher and Veronica testified because they were served with subpoenas and neither was eager to be involved. They did not speak with police about defendant or the crime until detectives knocked on their door and Veronica volunteered very little information to detectives when they were speaking with Christopher. As such, it is plausible that Veronica was unwilling to speak with counsel, as the People contend.

4. Failure to Request Instruction on Defense of Accident

Finally, relying on *People v. Villanueva* (2008) 169 Cal.App.4th 41 (*Villanueva*), defendant argues that trial counsel erred in failing to request a jury instruction on accident was ineffective. Defendant contends that counsel should have anticipated his testimony that he accidentally stabbed Jerald while brandishing his knife to stop Jerald from advancing and attacking him, and even if counsel failed to anticipate it, he was on notice of the facts supporting the instruction once defendant testified.

As defendant recognizes, the trial court did not have a sua sponte duty to instruct on accident, which is a defense "raised to rebut the mental element of the crime or crimes with which the defendant was charged." (*People v Anderson* (2011) 51 Cal.4th 989, 998; see §§ 26, 195; CALCRIM No. 3404.) On the facts of this case, we are unpersuaded by defendant's contention that counsel performed deficiently in failing to request an instruction on accident and we find his reliance on *Villanueva* misplaced.

In *Villanueva*, the defendant testified that he feared the victim in light of the victim's earlier threat to kill him and, after a verbal confrontation in a parking lot, he quickly stepped backward to avoid being hit by the victim's moving vehicle, at which time his gun fired and a bullet struck the victim in the face. (*Villanueva*, *supra*, 169 Cal.App.4th at pp. 46–47.) The trial court instructed on accident pursuant to CALCRIM No. 3404, but it refused the defendant's request for instructions on self-defense and attempted voluntary manslaughter based on imperfect self-defense. (*Villanueva*, *supra*, at pp. 44, 48, 53.) The Court of Appeal concluded that although a claim of accident is inconsistent with a claim of self-defense under California law, "substantial evidence of self-defense can exist in a case where the defendant has affirmatively testified that the shooting was accidental." (*Id.* at p. 51.) The court concluded that there was substantial evidence of self-defense and attempted voluntary manslaughter by means of imperfect self-defense under the facts of the case, which included evidence of an earlier altercation between the defendant and the victim that turned physical, threats made by the victim and

the victim's significant intoxication, and it concluded that the trial court's refusal to instruct on self-defense and attempted involuntary manslaughter was prejudicial. (*Id.* at pp. 52–53.) It also concluded that the trial court should have given more specific instructions to the jury on accident, and it directed the trial court to instruct the jury on excusable homicide and brandishing in the event the defendant again relied on accident during retrial. (*Id.* at pp. 53–54.)

In *Villanueva*, as discussed, the defendant shot the victim one time and testified that the gun misfired when he stepped back to avoid being hit by the victim's car. (*Villanueva, supra*, 169 Cal.App.4th at p. 47.) Here, in contrast, defendant did not testify that he stabbed Jerald by accident. Defendant described pulling out his knife, flicking it open, stepping forward and pushing Jerald with both hands as Jerald rushed him, likely resulting in the fatal wound to Jerald's chest. Defendant then stabbed Jerald another eight times, including through Jerald's back deeply enough to puncture his lung.

"'Unless a defendant establishes the contrary, [reviewing courts] presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy."'" (*People v. Centeno* (2014) 60 Cal.4th 659, 674–675, quoting *People v. Ledesma* (2006) 39 Cal.4th 641, 746.) Here, while defendant's testimony warranted instructions on self-defense and attempted voluntary manslaughter based on imperfect self-defense, which were given, it did not constitute substantial evidence that the repeated stabbing of Jerald was accidental (*Villanueva, supra*, 169 Cal.App.4th at p. 49) and, notably, such a theory is inconsistent with the self-defense theory pursued at trial (*id.* at pp. 50–52; see *People v. Olivas* (2016) 248 Cal.App.4th 758, 771 [tactical reason for not requesting voluntary intoxication instruction where primary defense in molestation case was that no misconduct occurred]). Under such circumstances, defendant has not shown that counsel's performance was deficient.

IV. Cumulative Error

Finally, defendant claims cumulative error. "In examining a claim of cumulative error, the critical question is whether [the] defendant received due process and a fair trial. [Citation.] A predicate to a claim of cumulative error is a finding of error." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068.) Having rejected defendant's individual claims of error, we necessarily reject his claim of cumulative error. (*People v. Williams* (2013) 56 Cal.4th 165, 201; *People v. Sedillo, supra,* at p. 1068.)

DISPOSITION

The judgment is affirmed.

_____
MEEHAN, J.

WE CONCUR:

_____
POOCHIGIAN, Acting P.J.

_____
SMITH, J.